

(9) Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending Massachusetts proceeding in any court, and shall require\* similar abstention on the part of court personnel\*. A judge does not engage in public comment when he or she speaks during any judicial proceeding in a case or when he or she issues a written memorandum of decision or order entered on the docket of a case.

(a) A judge is permitted to make public statements in the course of his or her official duties or to explain for public information the procedures of the court, general legal principles, or what may be learned from the public record in a case.

(b) This Section does not prohibit judges from speaking, writing, or teaching about cases and issues pending in appellate courts when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals and bar publications. This education exemption does not apply, however, to comments or discussions that might interfere with a fair hearing of the case.

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(c) This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(d) This Section does not prohibit a judge, directly or through a third party, from making public comments concerning his or her conduct provided that such statements do not reasonably put into question the judge's impartiality and do not address the merits of any judicial decision.

#### COMMENTARY TO SECTION 3B(9)

The requirement that a judge abstain from public comment regarding a pending proceeding continues during any appellate process and until final disposition. A case is impending for purposes of this section if it seems probable that a case will be filed, if charges are being investigated, or if someone has been arrested although not yet charged. This rule does not require a judge to abstain from public comment about a Massachusetts proceeding that is not pending or impending.

"Any court" for purposes of this section means any state or federal court within the United States or its territories.

Public comment does not include any oral statements made by a judge during a judicial proceeding in a case or any written memorandum of decision or order entered on the docket of a case. Accordingly, a judge, at any time, may supplement the court record by a written memorandum explaining his or her reasons for judicial action. For example, to educate the public, if he or she deems it appropriate, a judge may choose to issue a written memorandum in order to articulate in greater detail the rationale for the judge's action at

the time that action was taken, but the general obligation not to consider ex parte communications still applies. See Canon 3B(7). Canon 2 does not prohibit a memorandum of decision from being issued, even in response to public criticism, when that memorandum is based solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not that reasoning previously was articulated. By contrast, a memorandum of decision that intentionally misstates the record or the judge's rationale for the decision would violate Canon 2.

Public comment includes any other oral or written statement made publicly by the judge. A judge may, consistent with this section, make public statements about a pending or impending case in the course of his or her official duties. "In the course of his or her official duties" includes statements made by a judge in the performance of his or her administrative duties.

In addition, in making public comments outside the course of his or her official duties, such as when speaking to a member of the press or the general public, a judge may, consistent with this section, explain what may be learned from the public record in a case, including pleadings, documentary evidence, and the tape recording or stenographic record of proceedings held in open court. Speaking to a journalist is public comment even where it is agreed that the statements are "off the record." See also Section 3B(11).

"Conduct" as used in subsection (d) refers to the manner in which a judge behaves and not the substance of a judge's rulings. For example, an allegation that the judge consistently fails to work a full day is an example of conduct contemplated by subsection (d). The judge would be precluded from discussing the merits of any case, and the judge should be mindful that a response not raise a concern about that judge's ability to decide similar cases in the future. The authorization to comment on criticism of conduct is permissive; there is no requirement that a judge respond to allegations in the media or elsewhere. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue a statement in connection with allegations concerning a judge's conduct.

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